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OCTOBER TERM, 1997

NATIONAL ENDOWMENT FOR THE ARTS, *et al.*,

Petitioners,

—v.—

KAREN FINLEY, *et al.*,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF *AMICI CURIAE* OF THE NEW SCHOOL FOR SOCIAL RESEARCH AND THE BRENNAN CENTER FOR JUSTICE IN SUPPORT OF AFFIRMANCE

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Pursuant to Supreme Court Rule 37.6, *amici curiae* state that this brief was not prepared, written, funded or produced by any person or entity other than *amici curiae* or their counsel.

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INTEREST OF *AMICI CURIAE*[1]

Amicus The New School for Social Research[2] (the "New School") is a not-for-profit, tax-exempt education corporation

[1] Letters of Consent by the Parties to the filing of this brief are submitted to the Court herewith.

[2] On February 4, 1997, the Board of Regents of the State of New York approved a Charter Amendment changing the formal legal name of the institution to "New School University".

chartered by the Board of Regents of the State of New York. The New School is a university with undergraduate, graduate, and professional degree programs. Through its seven academic divisions, including its main campus in New York City, the New School serves thousands of students each year. The New School was founded in 1919, when it began as the nation's first institution of higher learning dedicated to the education of adults. In the many years since, the New School has enlarged its mission and has grown to be a center of intellectual and artistic excellence, located in the vibrant lower Manhattan community. Today with more than 6,000 full-time degree students pursuing training in the arts, political and social sciences, humanities, architecture, public policy, music and drama, the New School is a leader in undergraduate and graduate training. In addition, more than 20,000 students annually attend the New School in part-time, certificate, preparatory and personal enrichment academic programs.

The arts have been an integral part of the New School since its founding, and it has been a center of cutting-edge education in the arts and a place for performance opportunities for emerging artists. Many important artists—including Bernie Abbott, Aaron Copland, Martha Graham, and Robert Frost—have been associated with the School. Today the New School is one of the nation's largest centers of arts instruction. Over one million people have taken courses or participated in its arts programs offered to the public. In addition to over 2,000 adult students taking courses in the arts, more than half of the School's degree students are enrolled in the School's arts faculties, centered in three of the School's academic divisions: Mannes College of Music, The School of Dramatic Arts (in partnership with the Actors Studio), and Parsons School of Design. For nearly thirty years, the New School has been a recipient of grants disbursed by Petitioner The National Endowment for the Arts ("NEA"). The New School has used those funds, together with matching funds provided by private donors, for a variety of projects of benefit both to the university community and the general public.

The New School is no stranger to the First Amendment issues raised by viewpoint- and content-based restrictions imposed by Congress on recipients of NEA grants. In 1990 the New School instituted suit in the United States District Court for the Southern District of New York challenging the constitutionality of the statutory scheme adopted in 1989 by Congress in response to the same controversy concerning the use of NEA funds that led to the enactment of the statute at issue here in 1990. *New School for Social Research* v. *Frohnmayer*, No. 90 Civ. 3510 (LLS) (S.D.N.Y.). The statutory provision at issue in the prior case required all grant recipients to provide, as a precondition to receipt of any grant, an oath certifying that they would not later use funds granted by the NEA in a manner "which in the judgment of the National Endowment for the Arts . . . may be considered obscene," as that term was defined in Section 304(a) of the Department of the Interior and Related Agencies Appropriations Act of 1990, Pub. L. 101-121, 103 Stat. 701, 741, and to accept legal responsibility for enforcement of the restrictions set forth in Section 304(a). That litigation was settled when the NEA stipulated and agreed to delete the certification requirement from the "General Terms and Conditions for Organizational Grant Recipients". Stipulation and Order, *New School for Social Research* v. *Frohnmayer*, No. 90 Civ. 3510 (LLS) (S.D.N.Y. Feb. 20, 1991).[3]

Amicus The Brennan Center for Justice at New York University School of Law (the "Brennan Center") is a partnership between and among the family and friends of Justice William J. Brennan, Jr., many of his law clerks, and the faculty of New York University School of Law, designed to honor Justice Brennan's extraordinary contribution to American law. The

[3] In related litigation, a California federal court subsequently ruled the certification requirement unconstitutional under the First and Fifth Amendments. *See Bella Lewitzky Dance Foundation* v. *Frohnmayer*, 754 F. Supp. 774 (C.D. Cal. 1991). The NEA did not appeal from that ruling.

Brennan Center's ideal is to unite the intellectual resources of the academy with the pragmatic expertise of the bar in an effort to assist courts and legislatures in developing solutions to difficult problems in areas that were of special concern to Justice Brennan. Before giving his approval to the enterprise, Justice Brennan obtained a promise that the Brennan Center would function as a non-partisan, independent center of thought, paying no special deference to his views or opinions. This case presents the Court with a First Amendment issue of dramatic importance to Justice Brennan's lifelong struggle to maintain a free market in ideas: May government, acting on behalf of a temporarily-constituted majority, impose viewpoint-based constraints such as "decency" and "respect" on the grant of government subsidies to artists?

This case is of particular importance to the Brennan Center because the Center is providing counsel to the plaintiffs in *Velazquez* v. *Legal Services Corp.*, No. 97-CV-182, 1997 WL 789369 (E.D.N.Y. Dec. 22, 1997) (appeal pending), challenging the constitutionality of government efforts to control the First Amendment activities of Legal Services lawyers by imposing onerous conditions on the receipt of federal funds by lawyers for the indigent. *See also Legal Aid Society* v. *Legal Services Corp.*, 961 F. Supp. 1402 (D. Haw.), *modified*, 981 F. Supp. 1288 (D. Haw. 1997) (appeal pending). As the Chief Justice noted in *Rust* v. *Sullivan*, 500 U.S. 173, 200 (1991), when government funds traditional associational relationships of intense First Amendment concern, such as university teacher-student, doctor-patient, and, presumably, lawyer-client, it may not seek to use its economic power to control the First Amendment activities of the participants. In the arts, as in the legal profession, Congress may no more manipulate the speech of private persons through the viewpoint-based carrot than it may through the viewpoint-based stick.

SUMMARY OF ARGUMENT

Congress is not required to fund the arts. Neither the First Amendment nor any other constitutional provision imposes any such requirement. When the government chooses to do so, it is entitled to make funding decisions based upon its own determinations of artistic excellence. What it may not do, however, is to engage in a funding process which, by its nature, constitutes viewpoint discrimination in violation of well-established First Amendment principles.

The standards by which NEA grants are to be awarded under the 1990 statutory language require the NEA Chair to ensure that such judgments "tak[e] into consideration general standards of decency and respect for the diverse beliefs and values of the American public." 20 U.S.C. § 954(d)(1) (1994). The *Amici Curiae* submit this Brief to demonstrate that those legislatively-imposed standards on funding constitute the very sort of unconstitutional viewpoint discrimination that the First Amendment does not tolerate. This is so whether the restriction takes the form of direct statutory regulation of protected artistic expression or the indirect—but nonetheless real—regulation of that expression through its selective subsidization. *Amici* also urge the Court to consider the broader First Amendment dangers that would be posed if government could make the funding of academic, as well as artistic, endeavors contingent on conformity to the generalized notions of "decency" and "respect" imposed by a temporarily-constituted majority.

ARGUMENT

THE "DECENCY" AND "RESPECT" CRITERIA SET FORTH IN SECTION 954(d)(1) VIOLATE THE FIRST AMENDMENT

A. The Viewpoint Discrimination at The Core of Section 954(d)(1) Would Violate The First Amendment If It Took The Form of Direct Punishment of Speech

Certain constitutional propositions have so often been articulated by this Court that the only undetermined question they leave open is the identification of those rare circumstances in which they do not apply. There is no dispute, for example, about the validity of the general proposition that "above all else, the First Amendment means that government has no power to restrict expression because of its message, its ideas, its subject matter or its content." *Police Dep't* v. *Mosley*, 408 U.S. 92, 95 (1972). Or that where government seeks to punish speech because of its viewpoint, the violation of the First Amendment "is all the more blatant." *Rosenberger*, v. *Rector and Visitors of the University of Virginia*, 515 U.S. 819, 829 (1995). This Court has frequently reasserted that "[t]he government may [neither] regulate . . . based on hostility—or favoritism—towards the underlying message expressed," *R.A.V.* v. *City of St. Paul*, 505 U.S. 377, 386 (1992), nor regulate so as to favor the views of one speaker over those of another. *City Council* v. *Taxpayers for Vincent*, 466 U.S. 789, 804 (1984).

The principle underlying these now unexceptionable propositions lies at the heart of the First Amendment: it is to prevent government, as it responds to the will of temporarily-constituted majorities, from stifling or burdening dissent, nonconformity, or ideas that otherwise displease the majority. This Court has repeatedly struck down laws and regulations

that it has concluded do just that. *E.g.*, *Texas* v. *Johnson*, 491 U.S. 397, 414 (1989) ("If there is a bedrock principle underlying the First Amendment, it is that government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable."); *Hustler Magazine* v. *Falwell*, 485 U.S. 46, 55 (1988) ("An 'outrageousness' standard thus runs afoul of our longstanding refusal to allow damages to be awarded because the speech in question may have an adverse emotional impact on the audience.").[4]

These principles apply with particular force when the disfavored speech is considered by government to communicate "indecency" or "disrespect". *See Sable Communications, Inc.* v. *FCC*, 492 U.S. 115, 126 (1989) ("Sexual expression which is indecent but not obscene is protected by the First Amendment."); *Carey* v. *Population Services Int'l*, 431 U.S. 678, 701 (1977) ("[W]here obscenity is not involved, we have consistently held that the fact that protected speech may be offensive to some does not justify its suppression."). Just last Term, this Court struck down as impermissible content discrimination a federal statute criminalizing "indecent" speech transmitted over the Internet. *Reno* v. *ACLU*, 117 S. Ct. 2329, 2348 (1997) (observing that statute could extend to "artistic images that include nude subjects"). Indeed, outside the special—and extremely narrow—context of protecting children from the "pervasive" impact of broadcasting, this Court has never permitted Congress to impose general standards of "decency". *Compare FCC* v. *Pacifica Foundation*, 438 U.S. 726 (1978) *with Reno*, *supra*. And this Court has never—in any context—sanctioned the imposition by Congress of a

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[4] Indeed, this Court has not only assured that the First Amendment protects offensive speech; it has often gone the next step to observe that "a principal function of free speech under our system of government is to invite dispute. It may indeed best serve its high purpose when it involves a condition of unrest, creates dissatisfaction with conditions as they are, or even stirs people to anger." *Terminiello* v. *City of Chicago*, 337 U.S. 1, 4 (1949); *accord Johnson*, *supra*, 491 U.S. at 408-09.

standard of "respect". *Cf. Board of Education* v. *Barnette*, 319 U.S. 624, 632 (1943) ("Associated with many of these symbols are appropriate gestures of acceptance or respect: a salute, a bowed or bared head, a bended knee."); *United States* v. *Eichman*, 496 U.S. 310, 317 (1990) (striking down flag desecration described by Court as "unmistakably connot[ing] disrespectful treatment of the flag").

Protecting non-conformity and dissent is of particular concern in the context of academic and artistic expression. Both art and academic inquiry have traveled through history on a curious but parallel track: they have time and again generated "intellectual awakening," *Rosenberger*, *supra*, 515 U.S. at 836; at the same time, history is littered with proof that with such awakenings come ideas that challenge and confront—and enrage—governments. *See*, *e.g.*, *Suspended License: Censorship and the Visual Arts* 192-94 (E. Childs ed., 1998). It is precisely in the fields of artistic and academic endeavor, where "the State acts against a background and tradition of thought and experiment that is at the center of our intellectual and philosophic tradition," that the "danger" of stifling dissent or non-conformity is "especially real." *Rosenberger*, *supra*, 515 U.S. at 836; *accord Keyishian* v. *Board of Regents*, 385 U.S. 589, 603, (1967) ("That freedom is therefore a special concern of the First Amendment, which does not tolerate laws that cast a pall of orthodoxy over the classroom.").[5] Not surprisingly, what the Court said of music in *Ward* v. *Rock Against Racism*, 491 U.S. 781, 790 (1989), is true of art and academic inquiry in general: "From Plato's discourse in the Republic to the totalitarian state in our own times, rulers have known [their] capacity to appeal to the intellect and to the emotions, and have censored [them] to serve the needs of the state."

[5] The interplay between artistic and academic freedom is of special concern to the New School, which is both a university and, through its faculty and students who teach and study music, dance, writing and the visual and performing arts, a center of artistic expression.

Art, no less than philosophy, shapes the perceptions and attitudes that are antecedent to, and, ultimately, formative of, society's political activity. It is no coincidence that totalitarian societies cannot tolerate artistic freedom. *See* H. Lehman-Haupt, *Art Under a Dictatorship* (1954); J. Clapp, *Art Censorship: Chronology of Proscribed and Prescribed Art* (1972). Totalitarianism depends on a psychological acceptance of the idea that there is a single, officially-defined way to view the world. Hitler[6] and Stalin[7] waged war on artistic freedom because they understood that, by its nature, art subverts the totalitarian insistence that the world must be seen in only one way. The hyper-realism and rigorous classicism that characterized the official aesthetic of Stalinist Russian and Nazi Germany reinforced a governmentally-enforced insistence on a single world-view. Indeed, the aesthetic common denominator that links the paintings condemned by Hitler in the Munich Exhibition of "degenerate art" with Stalin's notorious suppression of Soviet artists is a rejection of any effort to portray multiple, unconventional visions of reality. It is precisely the capacity to remind us, again and again, that the world view of the transient majority is not the *only* world view that makes a free society's artists among its most important democratic practitioners. It is thus precisely in art where it is particularly " 'hazardous to discourage thought, hope and imagination . . . .' " *New York Times Co.* v. *Sullivan*, 376 U.S. 254, 270 (1964) (*quoting Whitney* v. *California*, 274 U.S. 357, 375 (Brandeis, J., concurring)).

We begin with the above principles not because the brief of the Solicitor General takes issue with them but because what Congress has done is in conflict with them. Section 954(d)(1) requires the NEA's Chair to "ensure" that "artistic excellence and artistic merit are the criteria by which applications are

[6] For a description of Nazi efforts to control art, see Lehman-Haupt, *supra*, at 219-30.

[7] For a description of Soviet efforts to control art, see *id.* at 78-87.

judged, taking into consideration general standards of decency and respect for the diverse beliefs and values of the American public. . . ." 20 U.S.C. § 954(d)(1). "Decency" and "respect" surely exemplify what this Court has defined to be a "viewpoint," namely "a specific premise, a perspective, a standpoint from which a variety of subjects may be discussed and considered." *Rosenberger*, *supra*, 515 U.S. at 831. The "prohibited perspective," *id.*, is, in fact, whatever is the current viewpoint of the current majority—expression that is not "decent" or does not reflect "respect" suffers the additional burdens imposed by section 954(d)(1); an accepted perspective—a governmentally-sanctioned one—suffers no such burden. On its face, the statute constitutes clear and unambiguous viewpoint discrimination; it codifies the majority's preferred morality.

While no inquiry into the legislative purpose animating Section 954(d)(1) is needed to find the provision viewpoint discriminatory, there can be no mistake as to the particular viewpoints of which Congress disapproved. Section 954(d)(1) was enacted because Congress disapproved of the viewpoints of two controversial artists who had previously received NEA funding: Robert Mapplethorpe and Andres Serrano. Mapplethorpe's work was reviled as glorifying homosexuality. *See* Remarks of Sen. Helms, 135 Cong. Rec. S12111 (daily ed. Sept. 18, 1989) ("It is an issue of soaking the taxpayer to fund the homosexual pornography of Robert Mapplethorpe, who died of AIDS while spending the last years of his life promoting homosexuality."). Serrano's work was repeatedly deemed to have been blasphemous. *See* Remarks of Sen. Helms, 135 Cong. Rec. S5595 (daily ed. May 18, 1989) (asserting that fellow Senator "is absolutely correct in his indignation and in his description of the blasphemy of the so-called artwork. I do not know Mr. Andres Serrano, and I hope I never meet him. Because he is not an artist, he is a jerk."). *See also* Brief *Amicus Curiae* of Morality in Media in Support of Petitioners at 3-7.

The first result of this surge of congressional reaction was the imposition by Congress of an "oath" under which recipients of NEA grants were to certify that they would not use funds to disseminate what in the NEA's judgment was obscene.[8] Following separate litigations instituted by the New School and the Bella Lewitzky Dance foundation successfully challenging the constitutionality of the oath, Congress sought a new route, recasting "artistic excellence and artistic merit" to include the "taking into consideration [of] general standards of decency and respect for the diverse beliefs and values of the American public . . . ." 20 U.S.C. § 954(d)(1). Whatever else may be said about this language, it was plainly a deliberate congressional response to and rejection of the kind of art that had generated the backlash against the NEA for funding Messrs. Mapplethorpe and Serrano. As Representative Henry, the author of the provision, stated:

> "[T]his substitute includes language at the heart of the grant making grant process. We add to the criteria of artistic excellence and merit a shell, a screen, a viewpoint that must constantly be taken into account. . . ."

136 Cong. Rec. H9417 (daily ed. Oct. 11, 1990).[9]

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[8] The oath required the recipient to certify that

> "[n]one of the funds authorized to be appropriated for the National Endowment for the Arts or the National Endowment for the Humanities may be used to promote, disseminate, or produce materials which in the judgment of the National Endowment for the Arts or the National Endowment for the Humanities may be considered obscene, including but not limited to, depictions of sadomasochism, homoeroticism, the sexual exploitation of children, or individuals engaged in sex acts and which, when taken as a whole, do not have serious literary, artistic, political, or scientific value."

Department of the Interior and Related Agencies Appropriations Act of 1990, Pub. L. No. 101-121, § 304, 103 Stat. 701, 741.

[9] Representative Rohrabacher summed up the views of Congress quite succinctly: "The debate over the past year has made it clear that our constituents do not want their tax dollars to be wasted on projects that

There can be little doubt that were the "decency" and "respect" provisions of Section 954(d)(1) enacted as part of a scheme of direct regulation—were government, for example, permitted to enforce a breach of peace statute by "taking into consideration general standards of decency and respect for the diverse beliefs and values of the American public"—this Court would strike it down as unconstitutional. *See R.A.V., supra* (holding ordinance unconstitutional that defines "disorderly conduct" to include content- and viewpoint-based categories of speech); *cf. Cohen* v. *California*, 403 U.S. 15, 22 (1971) (invalidating breach of peace conviction for public display of "scurrilous epithet"). The fact that the scheme at issue here appears as a part of limiting criteria for the disbursement of public funds does not, as we show below, render it permissible under the First Amendment.

B. The Viewpoint Discrimination of The "Decency" and "Respect" Provisions of Section 954(d)(1) Can No More Be Imposed As Part of Eligibility Criteria For Government Funding Than It Could As Part of Direct Regulation

In *Rust v. Sullivan*, 500 U.S. 173 (1991), this Court emphasized the breadth of congressional authority to determine how public funds may be allocated. *Id.* at 193. We do not dispute that conclusion. But *Rust* itself acknowledged that "[t]his is not to suggest that funding by the Government, even when coupled with the freedom of the fund recipients to speak outside the scope of the Government-funded project, is invariably sufficient to justify Government control over the content of expression." *Id.* at 199.

As the Court's language in *Rust* makes clear, it is hardly a novel proposition that the government's acknowledged power to decide whether to fund and who shall be funded may not be

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they find morally reprehensible." 136 Cong. Rec. H9408 (daily ed. Oct. 11, 1990).

used in a manner inconsistent with the First Amendment. This Court, thus far, has identified at least four settings in which the selective exercise of the government's power to reward in order to control expression has been held unconstitutional.

First, in *Speiser* v. *Randall*, 357 U.S. 513 (1958), the Court held that California could not condition the availability of a veterans' property tax abatement on the execution of a loyalty oath. The *Speiser* Court recognized that government could not be permitted to leverage its enormous economic power into an indirect method of requiring viewpoint conformity.

Second, in *FCC* v. *League of Women Voters*, 468 U.S. 364 (1984), and *Regan* v. *Taxation With Representation*, 461 U.S. 540 (1983), the Court recognized that, while governing majorities enjoy broad discretion to decide whether to subsidize First Amendment activities, the government may not use the leverage of its funding power to interfere with a subsidized recipient's freedom to use private funds to engage in such protected activities.

Third, in *Keyishian*, *supra*, and *Rust*, *supra*, this Court recognized that in certain areas in which the unregulated flow of speech has traditionally been deemed critical, such as public fora, the university, the doctor-patient relationship and, presumably, the lawyer-client relationship, the government's power to decide what kind of speech to subsidize is dramatically limited. *See Rust*, *supra*, 500 U.S. at 193. For example, in *Keyishian*, the Court rejected the argument that merely because the government subsidizes professors in public universities, it may exercise a degree of control over their First Amendment activities. *See also Sweezy* v. *State of New Hampshire*, 354 U.S 234 (1957). And, in *Rust*, the Court upheld the Title X speech restrictions only after finding that those restrictions did not disturb the freedom of speech that long marked the traditional doctor-patient relationship. *Rust*, *supra*, 500 U.S. at 200.

Finally, this Court has held that, even in areas that are not traditional loci of uninhibited exchange, government may not discriminate invidiously in its subsidies in such a way as to " 'aim[ ] at the suppression of dangerous ideas.' " *Speiser*, *supra*, 357 U.S. at 519 (citations omitted). For example, in *Rosenberger*, *supra*, the Court held that a university could not single out a student-published newspaper that espoused a religious viewpoint for a denial of funding.

Thus, under the clearly established precedents of this Court, Congress, having chosen to subsidize the creation of artistic endeavor by private persons who, as we show below, do not speak for the government, may not use its economic power as a device to impose majoritarian constraints on the viewpoint of art. Whether one views the relationship between artists and the public as an intensely protected First Amendment setting within the meaning of *Keyishian* and *Rust*, or whether one views Congress' behavior as an effort to allocate speech subsidies on the basis of a viewpoint that is acceptable to the majority as in *Rosenberger*, Congress' effort to impose standards of "decency" and "respect" on artists as a criterion for federal funding violates the First Amendment.

The Solicitor General's brief attempts to avoid the reasoning of *Rosenberger* first by asserting that it does not apply to the NEA funding structure, which it seeks to describe as a kind of free-floating regulatory scheme, incapable of precise definition under any of this Court's prior precedents: the NEA's "selective funding of artistic creations," it asserts, "cannot reasonably be described" as "creating a forum for the exchange of private views" because judging art is a "subjective" and "highly contested" enterprise. Brief of Petitioners ("Pet. Br.") at 30. The government, the Solicitor General further argues, "speaks" through the NEA, in a fashion, because it makes its own "aesthetic judgments" about what art to fund. *Id.* at 35-36.

But these efforts are unavailing. The first is refuted by the NEA's original enacting legislation itself. There, Congress

declared its intent "to support new ideas" and "to help create and sustain . . . a climate encouraging freedom of thought, imagination and inquiry. . . ." 20 U.S.C. § 951(10), (7) (1994).[10] A more sweeping directive to foster diverse private speech through government subsidy is difficult to imagine. *Compare* Pet. Br. at 34-35 (observing, without support, that NEA funding scheme "lacks the essential characteristic of a forum 'the free exchange of ideas' ").[11]

Nor, under this Court's precedents, is the NEA free to engage in viewpoint discrimination merely because it necessarily makes "aesthetic judgments" that contain an "element" of content control. For, while the Court has permitted government to control the viewpoint expressed "when it is the speaker or when it enlists private entities to convey its message," *Rosenberger*, *supra*, 515 U.S. at 833 (citing *Widmar* v. *Vincent*, 454 U.S. 263, 276 (1981)), the Court also made clear the impropriety of viewpoint-based restrictions in funding when government "does not itself speak or subsidize trans-

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[10] The Senate Report accompanying the legislation likewise provided that "the intent of this act should be the encouragement of free inquiry and expression. . . ." S. Rep. No. 89-300, at 4 (1965).

The Solicitor General, ignoring both the statute and its legislative history, suggests that the "subjective and highly contested" nature of the grant-review process somehow deprives that process of its indisputable character as a forum. But why should that be so? The mere fact of scarcity and subjectivity—the fact that only a small percentage of applicants receive funding and the fact that the NEA makes "editorial judgments"—can hardly deprive the program of its core characteristic, central to this Court's decision in *Rosenberger*, of the "expend[iture] of funds to encourage a diversity of views from private speakers." *Rosenberger*, *supra*, 515 U.S. at 834.

[11] We note, as well, that the Solicitor General misreads this Court's conception of a "forum". The funding scheme struck down in *Rosenberger* did not, as the Solicitor General suggests, involve a kind of private drawing room of idea-swapping. The purpose of the University's Student Activities Fund was to promote "a broad range of extracurricular activities that 'are related to the educational purpose of the University.' " *Rosenberger*, *supra*, 515 U.S. at 824.

mittal of a message it favors *but instead expends funds to encourage diversity of views from private speakers*." 515 U.S. at 834 (emphasis added). Contrary to the argument of the Solicitor General, this principle does not evaporate merely because the government exercises some degree of content control over the subject matter. *See, e.g., Perry Education Ass'n* v. *Perry Local Educators' Ass'n*, 460 U.S. 37, 46 (1983) (viewpoint-based restrictions directed against speech in a limited public forum presumed impermissible if speech within forum's subject matter limitations); *Cornelius* v. *NAACP Legal Defense & Educational Fund, Inc.*, 473 U.S. 788, 811-13 (1985) (same analysis requiring viewpoint neutrality in nonpublic forum where subject matter could be regulated); *Lamb's Chapel* v. *Center Moriches Union Free School District*, 508 U.S. 384, 393 (1993) (holding that, even assuming that an extracurricular film series in a public school was not a public forum, a school district may not "permit school property to be used for the presentation of all views about family issues and child rearing except those dealing with the subject matter from a religious standpoint"); *see also R.A.V., supra*, 505 U.S. at 386, 388 ("the power to proscribe [speech] on the basis of one content element (e.g. obscenity) does not entail the power to proscribe it on the basis of other content elements;" thus government "may not prohibit, for example, only that obscentiy which includes offensive political messages").[12]

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[12] Moreover, even granting the notion that aesthetic judgments are "individualized" and involve "communicative elements", in no sense does the government "speak" under the NEA funding scheme in the manner in which the Court suggested was required by *Rust*—with its own point of view, to convey its own message. Indeed, quite the contrary. *See* S. Rep. No. 89-300, at 4 (1965) ("[N]o undue preference should be given to any particular style or school of thought or expression."); *see id.* at 13 (noting that President Johnson, in proposing NEA, sought that government not "seek to restrict the freedom of the artist to pursue his calling in his own way").

The Solicitor General's argument that Section 954(d)(1) does not "categorically prohibit" funding (like the dissent's "prize" theory below, *see*

The Solicitor General seeks to avoid the force of these clear precedents by asserting that the "decency" and "respect" criteria set forth in Section 954(d)(1) do not constitute viewpoint discrimination at all—that the requirements refer not to the "substantive viewpoint or message" a work of art offers but its "mode" or "form". Pet. Br. at 39. Cases are cited involving public schools and broadcasting—two areas this Court has made clear are different from the norm applied in First Amendment cases generally precisely because of the unique role of schools in inculcating values and the then-uniquely pervasive role of radio and television in American life. *See Bethel School District No. 403* v. *Fraser*, 478 U.S. 675, 681-82 (1986) (referring to the "objectives of public education as 'the inculcat[ion of] fundamental values necessary to the maintenance of a democratic political system' " and thus according less "latitude" to First Amendment offensive speech rights of "children in a public school" than that accorded to adults) (citation omitted); *compare Pacifica, supra*, 438 U.S. at 748 (1978) ("Patently offensive, indecent material presented over the airwaves confronts the citizen, not only in public, but also in the privacy of the home, where the individual's right to be left alone plainly outweighs the First Amendment rights of an intruder.") (plurality opinion) *with Sable, supra*, 492 U.S. at 127 (noting that *Pacifica* involved notion that "broadcasting is 'uniquely pervasive' " and stating that *Pacifica* was "an emphatically narrow holding" (*quoting Pacifica, supra*, 438 U.S. at 748)) *and Reno, supra*, 117 S. Ct. at 2342 (distinguishing the Internet from broadcasting, which "as a matter of history had 'received the most limited

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Finley v. *National Endowment for the Arts*, 100 F.3d 671, 687-90 (9th Cir. 1996) (Kleinfeld, J., dissenting) (Pet. App. 35a-38a)) is a distinction without any consitutionally-cognizable difference. No one disputes that those works deemed "indecent" or "disrespectful" will suffer a burden not imposed on those works not so deemed. Section 954(d)(1) simply creates additional qualifying criteria (aimed at filtering out the ideas so identified) in order to obtain a grant.

First Amendment protection' " (quoting *Pacifica*, *supra*, 438 U.S. at 748)).

There is no escape for the NEA from generally applied First Amendment standards by invoking words such as "form, mode, or style of expression." Manet's classic painting, "Luncheon on the Grass", was criticized as indecent in its day not because of its "mode" but its content—a nude woman surrounded by two fully dressed, contemporary Parisian men.[13] Courbet's painting, "Sleeping Women", shocked audiences in its day not because of its "form" but its substance—two unclothed women lying on a bed in a sexually suggestive manner.[14] The "general standards of decency" that were deemed violated by Theodore Dreiser, Sinclair Lewis and H.L. Mencken in their days[15] were all understood to be viewpoint-related—what else?—and not rooted in their "form, mode or style."

The same has been true throughout the history of art. The very concept of "indecency" has been a metaphor for majoritarian orthodoxy. Whether it was El Greco offering a "mod-

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13 *See* M. Tannen, *The way of All Flesh*, N.Y. Times, May 14, 1995, at F44 ("The painting caused a scandal in its day, because the woman was clearly a contemporary, not some mythical Venus tossing her drapery around.").

14 *See* J. House, "Manet's *Maximillian*: Censorship and the Salon," *in Suspended License*, *supra*, at 192-94 ("[T]he police kept a watchful eye when [Courbet's] overtly lesbian composition . . . was put on display in a dealer's window.") (citing S. Faunce, *Courbet Reconsidered* (Brooklyn Museum Exhibition Catalogue, 1992) 176).

15 *See* S. Lewis, *The American Fear of Literature* (1930), *reprinted in The Man from Main Street: A Sinclair Lewis Reader* 7-8 (H. Maule & M.H. Cane eds., 1953) (praising Dreiser's battles against convention and censorship); H.L. Mencken, "Theodore Dreiser" and "Puritanism as a Literary Force" *in* H.L. Mencken, *A Book of Prefaces* 96, 197-283 (1917) (same). *See also Commonwealth* v. *Friede*, 171 N.E. 472 (Mass. 1930) (affirming conviction for selling Dreiser's *An American Tragedy* in violation of Massachusetts's obscenity statute).

est and decent" alternative to Michelangelo's "Last Supper",[16] or charges that Veronese's "Last Supper" was filled with "vulgarities",[17] or the accusations leveled at Manet, Chaucer, Shakespeare, and Nabokov,[18] or the suppression of "degenerate" art under the Nazis,[19] or Congressman Dondero's comic-opera attacks on "destructive" and "depraved" art during the McCarthy era,[20] *see generally*, *Suspended License*, *supra*, the use of criteria such as "indecency" and "lack of respect" have had no social meaning other than to signal efforts to impose the viewpoint of the governing majority. Indeed, an almost uncanny parallel exists between the "sense of decency" and "nothing disrespectful" standards imposed on art by the Council of Trent[21] in the sixteenth century, and the criteria of "decency" and "respect" imposed on the NEA by Congress.

To say this is not to disagree with Justice Stevens' observation that speech may sometimes be deemed "too loud or too ugly" to be permitted in certain narrow settings. *See Bolger* v.

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16 *See* A. Blunt, *Artistic Theory in Italy, 1450-1600*, at 118-19 (1940).

17 *See* E.G. Holt, *Religious Art at the Council of Trent and During the Inquisition*, *reprinted in* I J. Merryman & A. Elsen, *Law, Ethics and the Visual Arts*, 249-50 (2d ed., 1987).

18 *See Finley*, *supra*, 100 F.3d at 684 (Pet. App. 28a) (Kleinfeld, J., dissenting).

19 *See* H. Lehman-Haupt, *supra*.

20 *See* W. Hauptman, *The Suppression of Art in the McCarthy Decade*, *reprinted in* Merryman & Elsen, *supra*, at 268-75.

21 *See* II *A Documentary History of Art: Michelangelo and the Mannerists The Baroque and the Eighteenth Century* (E.G. Holt ed., 1947) (quoting 1563 decree of the Council of Trent: "On Sacred Images: . . . [N]othing may appear that is disorderly or unbecoming and confusedly arranged, nothing that is profane, *nothing disrespectful*, since holiness becometh the house of God," and describing trial of Veronese before the Council on charge that his "Last Supper" violated the decree) (emphasis added); *see also* Merryman & Elsen, *supra*, at 248.

Youngs Drug Products Corp., 463 U.S. 60, 83 (1983) (Stevens, J., concurring). Nor do we doubt that works that the NEA itself deems "too loud or too ugly" may not pass whatever aesthetic test it applies. But that is a far cry from denying funding to the Manets or Courbets of today because their messages fail whatever tests of "decency" and "respect" the NEA chooses to apply.[22]

Since notions of "decency" and "respect for American values" have no meaning apart from majoritarian acceptability, Congress' employment of such criteria in the selective allocation of subsidies can be no more than an indirect way of imposing the majority's "viewpoint" on a creative process dedicated to discovering new ways of seeing the world. *Cf. Smith* v. *Goguen*, 415 U.S. 566 (1974) (invalidating flag desecration statute with no ascertainable meaning except majoritarian disapproval). The government may not favor one political idea over another; the equivalent vice in the artistic setting is to suppress non-conforming aesthetic visions—visions that challenge (as they always have and should)—the majority's world view.[23] Section 954(d)(1) inescapably

[22] There is an additional element to the framework of Section 954(d)(1) that renders even more pronounced its viewpoint-based nature. The Commonwealth in *Rosenberger* had advanced (at least through the Court of Appeals) a particularly serious reason for excluding religious publications from funding: an understanding (embraced by four members of this Court) that not to do so would violate the Establishment Clause. *Rosenberger*, *supra*, 515 U.S. at 863-92 (Souter, J., dissenting). But Section 954(d)(1) was not enacted to serve—and on its face does not reflect—any such potentially proper motive. *See* pp. 10-11, *supra*.

[23] The Solicitor General repeatedly observes—without citation—that, as all art is "subjective," "decency" and respect" as a theoretical matter do not differ from other criteria for judging artistic "excellence" or "merit" (such as "form" or "style"). As we have noted, the fact that art involves judgments as to subject matter and quality does not immunize from constitutional scrutiny otherwise impermissible viewpoint discrimination. *See* pp. 15-16, *supra*. But there is, as well, an air of unreality about Petitioner's attempt to treat "decency" and "respect" as nothing more than criteria for "aesthetic judgment". Artistic excellence and merit have always reflected efforts to identify the transcendent, to rise beyond the temporal. Whatever social meanings merit and excellence reflect, they reflect at least the search for the transcendent. *See, e.g.*, K. Clark, *What Is A Masterpice?* 44 (1979). Decency and respect, on the other hand, are inherently and always political constructs; through history (including the history of this Court's constitutional jurisprudence), they have reflected only majoritarian values, and regulations imposing those values on non-conformists and dissenters have been the subject (as we have shown throughout this Brief) of special concern of the First Amendment.

suffers from that vice. As such, it must violate the First Amendment's ban on viewpoint discrimination.

Finally, in this regard, we note the Solicitor General's less than complete reference to the conclusions of the Independent Commission constituted to advise the NEA in 1990, and the Legal Task Force of First Amendment scholars convened by the Independent Commission to advise it.[24] *See* Independent Commission, *A Report to Congress on the National Endowment for the Arts* (September 1990) (the "Report") at 83-91. The Consensus Statement of the Legal Task Force—which the Solicitor General does not quote—concluded, in pertinent part:

> "1. There is no constitutional obligation on the part of the federal government to fund the arts. That is a policy decision to be determined by Congress based upon its views as to whether it is useful and wise for the federal government to play a role in the arts funding process. The Constitution offers no guidance as to whether the arts should be funded by the federal government.
>
> "2. If federal funds are used to subsidize the arts, however, constitutional limitations on how the arts are funded may come into play. The most important of these is that while Congress has broad powers as to how to

[24] Two of the three principal authors of this Brief served on the six-person Legal Task Force.

spend public funds, it may not do so in a way that the Supreme Court has said is 'aimed at the suppression of dangerous ideas.' Congress plainly may, for example, determine to spend all federal funds designated for the arts on music and none on the visual arts. Or vice versa. It may expend funds to celebrate American history or American diversity, even though spending for one purpose naturally means less money is expended on others. And, of course, it may insist on artistic excellence as a prerequisite for any funding. *What it may not do, however, is to choose those to be funded—and, often more important, those not to be funded—in a manner which punishes what Congress views as "dangerous content." When funding denials are the product of invidious discrimination with the aim of suppressing a particular message and for no other reason, a particularly powerful case might be made that the decision was unconstitutional.*"

Report at 85-86 (emphasis added). The Legal Task Force was thus in agreement on one point that is crucial here: Congress—no matter what drafting mechanism it employs—may not, consistent with the First Amendment, impose viewpoint-based restrictions, regardless of whether those restrictions are accomplished directly or indirectly. That proposition, in and of itself, requires affirmance of the ruling of the court below.

CONCLUSION

The judgment of the Court of Appeals should be affirmed.

Respectfully submitted,

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